SUPREME COURT, U. S.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-931

STATE OF CALIFORNIA, *Petitioner,*

vs.

ROBERT F. BROWN, et al., *Respondents.*

STATE OF CALIFORNIA, *Petitioner,*

vs.

ABBASS BOZORG, et al., *Respondents.*

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California

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Petitioner, the State of California, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in this proceeding on June 19, 1973, directing the issuance of writs of habeas corpus discharging respondents from the custody imposed by the San Francisco Municipal Court pursuant to judgments of conviction of disturbing the peace (Cal.

Pen. Code §415) and unlawful assembly (Cal. Pen. Code §§407, 408).

OPINIONS BELOW

The opinion of the California Supreme Court in these two companion cases, a copy of which is set forth as Appendix A to this petition, is reported as *In re Bozorg,* 9 Cal.3d 612 [108 Cal.Rptr. 359, 510 P.2d 1017] (1973). Petitioner's application for rehearing was denied on July 18, 1973, two justices voting in favor of rehearing. See Appendix B.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code, section 1257(3), since a right has been especially set up and claimed under the Constitution of the United States and the validity of a state statute is drawn in question as being repugnant to that right. This petition is timely filed pursuant to the order of this Court on October 3, 1973, extending the time for filing this petition to December 15, 1973. (*California v. Brown,* A-350).

QUESTIONS PRESENTED

Whether respondents and 1,000 other persons, many of whom were armed with billiard balls, rocks, knives, baggies of wet paint, 2″ x 2″ clubs, who engaged in a loud, noisy, shouting demonstration which

intentionally disrupted classes in session and students studying in the library and taking final examinations on a college campus, were engaged in constitutionally protected conduct under the First Amendment of the United States Constitution or were lawfully prosecuted and convicted under a state breach of peace statute declaring "loud or unusual noise" which "wilfully and maliciously disturbs the peace" to be a misdemeanor.[1]

STATEMENT OF THE CASE

A. Bozorg's Case:

On June 10, 1969, after a lengthy jury trial, respondent Bozorg and four other persons were convicted of disturbing the peace (Cal. Pen. Code §415) and unlawful assembly (Cal. Pen. Code §§407, 408) and acquitted of the charge of refusal to disperse (Cal. Pen. Code §409). On July 2, 1969, the defendants in that case were sentenced by the San Francisco Municipal Court to two years probation, fines ranging from $250 to $300, and jail terms ranging from 30 to 40 days.

On December 29, 1970, the Appellate Department of the Superior Court of San Francisco affirmed the judgments without opinion. The same court denied rehearing and denied certification of the appeal to the California Court of Appeal. Thereafter on Feb-

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[1]California Penal Code section 415 provides in pertinent part: "Every person who maliciously and wilfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct . . . is guilty of a misdemeanor. . . ."

ruary 16, 1971, the State Court of Appeal denied Bozorg's petition for writ of habeas corpus, without opinion.

Two days later, on February 18, 1971, a petition for habeas corpus was filed in the California Supreme Court, which, after two and one-half years, culminated in the decision petitioner seeks to have this Court review.

B. Brown's Case:

On January 5, 1970, respondent Brown and six other persons were convicted after a lengthy jury trial of disturbing the peace and unlawful assembly and acquitted of refusal to disperse. Each defendant was sentenced to 60 days in jail by the San Francisco Municipal Court.

On February 9, 1970, the Appellate Department of the Superior Court affirmed the judgments without opinion and certification to the California Court of Appeal was denied. On March 26, 1971, the Court of Appeal also denied defendant's application for habeas corpus without opinion.

On April 7, 1971, a petition for habeas corpus was filed in the California Supreme Court. The matter was subsequently consolidated with the Bozorg action for oral argument and decision, although each proceeding originated in a separate jury trial.

STATEMENT OF THE FACTS

The facts in both cases are essentially the same, as the opinion of the California Supreme Court reveals. That opinion does not, however, fully and fairly portray the extent of the disruption which occurred at the San Francisco State College campus on January 23, 1969. Accordingly, the state sought a rehearing and now sets forth that version of the facts most favorable to the judgment of the trial court as is proper under both state and federal law. *People v. Redmond,* 71 Cal.2d 745, 755 (1969); *Glasser v. United States,* 315 U.S. 60, 80 (1941); *Taylor v. Mississippi,* 319 U.S. 583, 585-586 (1942).

A. Events of January 23, 1969:

On January 23, 1969, at about noon, respondents and 1,000 or more other persons gathered in the central campus area of San Francisco State College in San Francisco to hear speeches by leaders of the student strike then in progress on campus. The avowed purpose of the gathering, according to respondents themselves, was to "Shut it down", that is close the campus until their strike demands were met (RT 1195, 1205-1206, 1275) (RT 436:4, 1706:11).[2] Because of the strike, which had been in progress for several months (RT 21), the administration of the college had published a temporary emergency regulation on January 6, 1969, prohibiting all rallies in the central area of the campus adjacent to classes but

[2]Transcript references (RT) are to the Reporter's Transcript on appeal in the *Brown* case. As noted, the facts in the *Bozorg* matter are essentially the same as here summarized.

permitting them elsewhere (RT 542, 615-619). The emergency regulation was to be in effect for only a few weeks, during the final examination period.[3] Some 8,000 copies of that regulation were widely dis-

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[3]Pertinent portions of the regulation which was read into the record in its entirety, follow:

"'To: Faculty, students, and staff of the San Francisco State College.

'With only four weeks left in this semester we all have a lot to do if courses are to be successfully completed and credit granted. Fortunately, the faculty voted in November to hold extra sessions where necessary to make up for time lost in the past semester's convocations and other interruptions of the normal academic process. Many instructors have used the holiday period to replan their classroom activities for January. *The overwhelming majority of teachers and students will therefore be extremely busy for the next four weeks with exams and preparations for exams.*

'In view of the foregoing the period begining January 6 and extending through January 31 is hereby declared to be a limited activity period. Specifically, *rallies*, parades, be-ins and all other public events *likely to disturb the studious in their reading and reflection are hereby forbidden on the central campus.* The speakers' platform may not be used and no substitute locations on the central campus are authorized.

'It is not the intention of this administration to deny freedom of expression, *but the principle of appropriate place and time will apply.* People wishing to hold outdoor meetings or rallies in January may do so on the athletic field, which may be reserved for this purpose by application through the dean of students to the division of health, physical education and recreation. On the athletic field, amplification equipment may be used. However, the meetings shall be conducted and the crowd dispersed in such a way as not to disturb classroom activities, the peace and quiet of the central campus and its adjoining academic buildings or the peace of the community surrounding the college.'" (RT 615-617) (our emphasis).

The jury was instructed that the letter was admitted only on the issue of state of mind and intent (RT 2056:9-13, 939:13). The court correctly ruled that the letter was a valid college regulation (RT 1596). *Tinker v. Des Moines Ind. School Dist.*, 393 U.S. 500, 506-507, 508-511 (1969); *Goldberg v. Regents of University of California*, 248 Cal.App.2d 867, 878-879 (1967); *Siegel v. Regents of University of California*, 308 F.Supp. 843, 833-838 (N.D. Cal. 1970); *People v. Hairston*, 8 Cal.App.3d Supp. 19, 23-24 (1970).

tributed and posted throughout the campus (RT 543-544, 582-585). All faculty and staff received a copy of the regulation (RT 584-586). The regulation was also the subject of headlined front-page local newspaper coverage (RT 914-919). Several defense witnesses conceded knowledge of the policy (RT 1384-1485, 1288, 1183, 1193, 1015).

During the morning of January 23, 1969, before the assembly formed at noon, there was extensive picketing of the campus (RT 424, 432-434). At 8:00 a.m. there were 20-30 pickets at the entrance to the college (RT 424:15-23). By 11:45 a.m. there were 400-500 pickets there (RT 433), as well as numerous pickets at various buildings and 200-250 pickets at the library (RT 433, 537). At noon, these pickets converged upon the central campus area (RT 435-436, 628-629, 690-691, 1402).

The demonstration commenced with speeches given by several speakers (RT 469). Portable bullhorns were used as amplifiers (RT 1750:13). Various witnesses testified that the participants in the demonstration were loudly chanting and shouting, "Power to the People, On Strike, Close it Down, Shut it Down", continuously throughout the rally (RT 464-465, 496, 540, 629, 691:21-23, 778, 779-800, 1688). Television movie film of the demonstration was shown to the jury (RT 462-479). A number of defense witnesses conceded that the chanting was loud enough to make it difficult to hear the speakers, even though they were using the bullhorns (RT 1088, 1164, 1188, 1194-1195, 1202, 1380, 1496-1497, 1750).

Professor Williams, who was teaching a class at the time, testified that the noise "drowned [him] out completely" (RT 691:9). A student testified that the noise was getting louder and louder (RT 800-801). Another witness described the assembly as "very noisy" (RT 501:18-26).

B. Previous Campus Disorders:

The January 23rd demonstration was one in a series of such gatherings on campus which had occurred in recent months (RT 424:12-14). Three or four were held in November 1968, another on December 11 or 12, and one on January 7, 1969 (RT 487, 489, 697:18-23). The prior gatherings had been marked by loud noise, disruption, violence, destruction and injury (RT 488, 562-564, 1390). San Francisco Police Captain Donald Scott,[4] so testified. He had 30 years of police experience and had been present at all such previous disturbances (RT 423, 487-491). Other witnesses corroborated his account of the violence and disruption (RT 562-564, 566).

Specifically, at prior rallies, participants had thrown rocks, interrupted classes, broken windows and destroyed other property on campus (RT 563). Professor Williams and others so testified (RT 690, 751, 780, 790, 794). Bombs had exploded and started fires in at least one building on campus (RT 790:4). Beatings and assaults instigated by participants had occurred at the rallies (RT 563-564, 805, 1699:6-8).

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[4]Now Chief of Police of San Francisco.

College employees and students were harassed and intimidated (RT 791:15, 803-804). Persons participating in the assemblies had forcefully entered and disrupted classes (RT 424, 690, 1267). The work of administrative and clerical employees was also disrupted (RT 566).

C. Disruption of Classes on January 23, 1969:

Remembering these recent events, many instructors and employees on campus were "apprehensive" if not terrified for their own and the students' safety when the assembly of January 23, 1969, commenced (RT 713:20-24, 813:8-10). Some reacted by barricading their windows (RT 762-778-779). Clerical and administrative employees were also disturbed in their work and were frightened by the demonstration (RT 752: 22-26, 781, 789, 565-566). Mr. Harroun, Mrs. Schmid and Professor Williams so testified (RT 780, 751, 687).

Several defense witnesses conceded that classes were scheduled in nearby buildings at the time the rally was held in the central campus area (RT 1013, 1213). Some 224 classes were in fact in session when the assembly began at noon (RT 587). For example, Professor Williams testified that his 11:00-12:15 class was continuously disrupted by the noise of the demonstrators (RT 684-686). Professor Williams testified as follows:

> "Q. Did the noise interrupt or interfere with your teaching that class?
>
> A. It interfered very badly with the teaching of the class.

Q. As the morning went on in that class, did you notice any change in the noise level from the outside.

A. Yes, as the morning went on, it became noisier. It got noisier. There were more voices that I could hear and there were chants which became more frequent and went on longer and louder. So the noise level increased.

Q. Do you have a certain amount of material that you intended to teach that particular day?

A. Yes, I had laid out—and the reason I remember it so well, it was the last day of class, that class for that semester, final exam was the following Tuesday, the 28th, and I had laid out an amount of material that I hoped and planned to cover so as to wrap up my class in fairly good fashion.

Q. Were you able to complete the amount of material that you had laid out for your class that day?

A. No, I couldn't get through it. I got through, I would say, somewhere between half and two-thirds of it, and certainly no more than two-thirds of the material, I was able to get over in poor fashion." (RT 687:5-25).[5]

Enrollment at the college was approximately 18,000 students (RT 588). Many students were studying for upcoming final examinations. Indeed, some examinations were already in progress (RT 798-799, 802, 810). However, the chanting and shouting to the demonstrators seriously disturbed those taking such

[5]Other professors testified to the disruption of their classes at the *Bozorg* trial (ZT 355-359, 215-217, 117-120). "ZT" references are to the *Bozorg* trial.

examinations (RT 807, 799-800, 813). A student, Miss Benfer, so testified (RT 802-804). She was called a "scab" upon entering the examination (RT 800:16).

Neither was the rally free from violence. The demonstrators, who were encircled and arrested, were found to have, on their persons, in their hands, or on the ground by their feet, a variety of missiles capable of causing serious injury: rocks, billiard balls, bags of wet paint, pieces of asphalt, knives and metal knitting needles.[6] Many carried pickets larger than the usual one-quarter inch standard (RT 435, 622, 750-751). Some sixty 2″ x 2″ standards were seized, many without signs attached (RT 466, 454). Prosecution and defense witnesses agreed the 2″ x 2″ (4 feet in length) pole was unusually large. Indeed, respondent Bush conceded that they were too heavy to be used as a picket standard (RT 1576-1578).

Earlier, an officer had observed billiard balls being surreptitiously distributed to the demonstrators as they were marching (RT 623-624, 527, 533, 636), and reported this to the Police Command Post (RT 533, 428, 625).[7]

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[6]There was testimony at the *Bozorg* trial, that an officer was injured by a rock throwing demonstrator who sought sanctuary within the rally group (ZT 483-493). Others also threw rocks and cans at the police (ZT 487).

[7]In these circumstances, we sought rehearing below in part upon the California Supreme Court characterization of the rally as "generally orderly." 9 Cal.3d at 615. In all fairness, we submit that the record belies that characterization.

D. The Arrests:

In anticipation of disruption, many police officers were posted on campus.[8] But, the police made no effort to prevent the rally so long as it remained a lawful assembly. The police had decided hours earlier that the demonstration would be dispersed only if it appeared to be unlawful, *i.e.*, if there was a disruption of classes (RT 429-431). As noted above, the noise of the demonstrators did disrupt classes and library studies. By their own account, the police acted only when the noise level reached such a high level, that disturbance of classes was inevitable (RT 527, 493-494).

Thus, at 12:15 p.m., the participants in the assembly were ordered to vacate the central campus area by Mr. Scoble, a representative of the college administration. He announced over a powerful loudspeaker system (RT 432-437, 440, 607-608), that the assembly was disrupting classes and requested that the rally move to the athletic field in accordance with the administration regulation (RT 436-437, 507, 566-567). The rally continued.

Then, at 12:20 p.m., San Francisco Lt. Eimil ordered the demonstrators to disperse pursuant to section 726 of the Penal Code of the State of California and in the name of the People of the State of Cali-

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[8]There were approximately 190 officers assigned (RT 423). "In contrast to . . . the confrontations . . . of early December, the mass arrest of January 23 was carried out by a relatively small number of police officers, and almost without injury. Tactics had improved." *Shut It Down!*, A Report to the National Commission on the Causes and Preventions of Violence (by Wm. H. Orrick, Jr.) June 1969, p. 64.

fornia (RT 406, 494, 1692, 438). He repeated the order twice (RT 438:18-19). Upon hearing the word "California", the assembled people turned and shook their fists at the announcer and repeatedly shouted, "Fuck California" (RT 1692-1693, 451, 1788, 473-474, 753-754).

Lt. Eimil had gone among the crowds at previous rallies to request dispersal but had been physically assaulted (RT 440). Consequently, on this occasion, all directives to disperse were made from the Police Command Post on the roof of the Administration Building (RT 428). Captain Scott stated that the loudspeaker volume was quite sufficient for all those in the central campus area to hear and understand (RT 440). It had been obtained from the State Civil Defense Office (RT 432-433).

Many people promptly left the assembly. As many as 200-300 persons dispersed (RT 438, 503-504, 632, 1708:12). For some, however, the noise and shouting of the assembled persons was so loud that it was difficult to hear the announcements. Defense witnesses so testified (RT 1088:23, 1164, 1188:11, 1202:9). This evidence may explain the jury verdict of acquittal of the refusal to disperse charge. (Cal. Penal Code Section 409).

After five more minutes, the 437 persons who did not respond to the order to disperse (RT 671, 494-495) were surrounded and arrested (RT 441-442). Among those arrested were the respondents herein (RT 727-728, 737-738, 745, 769-777, 837-838). Another 150-200 of those remaining in the crowd after the

dispersal order escaped arrest by running off as the police moved in (RT 481, 503-504). This latter group attacked the campus library, yelling: "Kill the pigs" and "burn the library" (RT 844). They succeeded in breaking windows and setting fires (RT 866, 481-482, 526, 762-765, 844-847). Officer Mahoney was hit by a flying club as he and seven other officers, assigned to defend the library, narrowly escaped serious injury (RT 847, 843-844).

E. Defense:

All the defendants (except Mrs. Brown and Mrs. Alt) testified and presented several witnesses, whose testimony was generally in conflict with the prosecution witnesses as to the degree of noise and disruption caused by the demonstrators (RT 1085, 1087, 1094, 1123, 1162-1163, 1224, 1380, 1524). However, some defense witnesses indicated that they were in interior offices with no windows (RT 1122, 1129 [Miss Neff], 1221 [Miss Van Wambeke]). Other such witnesses included persons who had been arrested with respondents (RT 1280, 1181, 1423).

Several defense witnesses conceded, however, that there had been chanting of "On Strike, Shut it down, Power to the People", etc., and that it was difficult to hear the speakers (RT 1088, 1164, 1188, 1194-1195, 1202, 1380, 1496-1497). Many testified that "Shut it down" meant close down the college (RT 1195, 1205-1206, 1275).

Each of the petitioners who testified at the trial said that they were participants in the demonstration

on January 23, 1969. After initial denials, Townsend and Bush admitted participating in the chanting (RT 1495, 1498, 1339, 1341, 1357). A movie film showed Mrs. Alt participating in the demonstration and shouting "scab" (RT 1916:18-24, 1649, 1836-1837, 1270). The Browns, Cirimele, Bush and McGee admitted participation and carried picket signs (RT 1029, 1242, 1569-1570).

Although labeled a "student" strike by the California Supreme Court, the record shows that the college had an enrollment of 18,000 and that only 1,000 persons attended the rally. It is not clear how many of these were students. The record herein does reveal that only defendant Bush was a San Francisco State student (RT 1555). The Browns, Mrs. Alt, and Mr. Townsend were neither students nor employees of San Francisco State College (RT 1120, 1026-1029, 1485). Cirimele and McGee were employees of the college (RT 1238-1239, 1330).

F. Rebuttal:

The prosecution introduced a portion of film taken by a television cameraman to demonstrate the loud noise and disruption caused by the demonstrators and to rebut defense testimony to the contrary (RT 1745, 1715, 1723). A police officer testified that the film was a fair and accurate representation of the scene (RT 1745-1746). The cameraman testified that the chanting and shouting of the demonstrators was louder than that of one of the speakers, Mr. Alvarado, even though Alvarado was speaking through a bullhorn (RT 1811:5-7, 1808).

HOLDING OF THE CALIFORNIA SUPREME COURT

The California Supreme Court held:

> "We conclude that section 415 cannot, consistent with *First Amendment rights*, be applied to prohibit all loud speech which disturbs others even if *it* was intended to do so."
>
> *In re Bozorg, supra,* 9 Cal. 3d at 621 (our emphasis).

> "We are satisfied that loud shouting and cheering, constitutes the loud noise prohibited by section 415 only in two situations: (1) where there is a clear and present danger of imminent violence and (2) where the purported communication is used as a guise to disrupt lawful endeavors. Measured by this standard, it is clear that the *instructions* in both cases before us relating to Penal Code section 415 were inadequate and erroneous. (Footnote omitted.)"
>
> 9 Cal.3d at 621. (Our emphasis.)

REASON FOR GRANTING CERTIORARI AND SUMMARY OF ARGUMENT

I. The facts established at trial reveal that San Francisco State College was the scene for many months in 1968 and 1969 of violent, noisy, disruptive conduct. On January 23, 1969, at a time set for classes and final examinations in adjacent buildings, a crowd of 1,000 or more persons, many of whom were armed with billiard balls, rocks, knives, 2″ x 2″ clubs and baggies of wet paint, converged on the central campus. They were not engaged in "pure

speech" when they loudly and continuously shouted "On Strike. Shut it down!" In size, dangerous implements and sheer noise level they had the means to do just as they threatened. In fact, the record summarized above discloses that respondents and their associates, with intent to so do, disrupted many classes and final examinations then in progress.

For such conduct, we think that respondents were properly prosecuted and convicted consistent with the guidelines set forth by this Court in *Grayned v. City of Rockford,* 408 U.S. 104 (1964). The People of California have a compelling interest in preventing disruption of the classrooms and related academic functions of its public colleges. This Court will do as much or more to protect First Amendment activity by condemning the invasion of academic freedom by respondents' conduct herein as it has in past cases by upholding lawful assembly against overzealous government curtailment.

Yet, the California Supreme Court concluded that the jury was given incorrect instructions which did not define the terms "loud . . . noise" or "offensive conduct" and thereby permitted the jury to convict respondents for engaging in conduct which was constitutionally protected.

With respect, we submit that the California Supreme Court has erred, and this is particularly true in the *Brown* case. There, the trial court's instructions fully ensured the protection of respondents' First Amendment rights as delineated in *Grayned* and related decisions of this Court. It is true, how-

ever, as our detailed discussion below will reveal, that no comparable First Amendment instructions were given in the *Bozorg* case. For this reason, we believe that this Court should, at very least, reverse the California Supreme Court in the *Brown* case and recognize this critical distinction between the two cases (Argument I, *infra*).

II. We also seek certiorari to review the California Supreme Court's ruling that loud noise which disrupts classes with intent to so disrupt, is nevertheless activity protected by the First Amendment simply because communication of ideas was also intended. As discussed below (Argument II), we contend that this formulation is both erroneous and unworkable. It has repeatedly been rejected by this Court. E.g., *Grayned v. City of Rockford, supra.* The California ruling seems to arise from the premise that loud noise is to be treated as speech. We must disagree. This is not a "pure speech" case as was *Cohen v. California,* 403 U.S. 15 (1971), or *Tinker v. Des Moines School Dist.,* 393 U.S. 503 (1969): rather, this is a noisy conduct case, wherein a statute like that approved on its face in *Grayned v. City of Rockford* is being applied, with appropriate instructions, to a particular set of facts. We urge certiorari therefore so that this Court may consider and delineate the constitutional limits within which a *Grayned*-type statute may be applied.

ARGUMENT

I

THE TRIAL COURT'S INSTRUCTIONS IN THE BROWN CASE INSURED THE PROTECTION OF FIRST AMENDMENT ACTIVITY.

It was in the trial court's instructions that the California Supreme Court found reversible error. It was held that the instructions permitted the jury to convict repondents for engaging in conduct which was constitutionally protected. 9 Cal.3d 621 n.5, 625. To the contrary, it is the State's position that the instructions in the *Brown* case ensured the protection of respondents' First Amendment rights and indeed presented the case to the jury on an issue that was narrower than the facts and the law required.

The jury was initially instructed in the language of the applicable provisions of section 415 (RT 2052:13-19).[9] The words "wilfully" and "maliciously" were defined (RT 2052-2053) and the jury was told that such terms required that they find a specific intent to vex, annoy or injure others on the part of the defendants (RT 2049-2050). The word "tumultuous" was defined to mean "noisy" or "boisterous" conduct (RT 2052:22-24). No definition was given to the word "offensive" or the phrase "loud or unusual noise."

Concededly, the trial court's instructions regarding tumultuous or offensive conduct did not comply literally with the definitions thereof established by *In*

[9]The pertinent instructions referred to are attached hereto as Appendix C (RT 2048-2056).

re Bushman, 1 Cal.3d 767, 773 (1970), or *Cohen v. California*, 403 U.S. 15, 17 (1971). From *Bushman* and *Cohen*, the following rule may be distilled: "tumultuous or offensive conduct" refers only to conduct which is itself violent or which constitutes a clear and present danger of provoking others to violence. See Appendix D. CALJIC No. 16.240 (1973 Rev.). The same Appendix also contains the instructions now required by the California Supreme Court decision in the instant case.

However, the trial court did give extensive instructions regarding freedom of speech and assembly which afforded the defendants equivalent, if not greater, protection of their First Amendment rights than the *Bushman-Cohen* instructions. The jury was first told that "The right . . . to peaceably assemble includes the right to communicate ideas by singing, chanting and shouting, as well as by signs, symbols and slogans," but that "pickets shouting in unison in a loud and boisterous manner disturbing the peace and quiet of the neighborhood[10] and thereby interfering with a complainant's peaceful enjoyment of property is unlawful conduct" (RT 2053-2054). Furthermore, the jury was told that "The offense known as breach of the peace embraces a large variety of conduct destroying or menacing public order and tranquility. It includes, not only violent acts but acts likely to produce violence in others. When clear and present danger of immediate threat to public safety, peace or order

[10]"Neighborhood" was properly defined to include a campus (RT 2052:21).

appears, the power of the State to prevent or punish is obvious" (RT 2054:7-13).

For the above instructions, the trial court merits commendation not criticism. The language of the instruction is remarkably accurate in its anticipation of the decisions in *In re Bushman*, *supra*, and *Cohen v. California*, *supra*. It will be recalled that the trial in *Brown* was completed on January 5, 1970, before the decisions in *Bushman* (January 27, 1970) and *Cohen* (1971).

Here, in substantial compliance with *Cohen*, the jury was effectively instructed that they could convict of disturbing the peace only if respondents' conduct was intentional and was either:

(1) violent (RT 2054:10); or

(2) constituted a clear and present danger of provoking violence in others (RT 2054:10-12); or

(3) so noisy as to disturb others by interfering with the peace and quiet of the neighborhood, here a college campus, including adjacent classes in session (RT 2053-2054). Compare, *Grayned v. City of Rockford*, *supra*. Moreover, by defining "tumultuous" to mean "noisy" or "boisterous", the trial court presented the case to the jury primarily on the narrow theory of "loud noise" even though the evidence would also have supported conviction based upon conduct provoking violence or itself violent.

Indeed, the trial court went even further in ensuring that the defendants' First Amendment rights were protected. In its concluding instructions regarding the right of assembly the court stated:

> "A peaceful assembly is an exercise of freedom of speech guaranteed to all by the First Amendment to the United States Constitution. It is not a violation of the law to attend and remain at a peaceful assembly.
>
> "The right of freedom of speech is protected by both the Federal and State Constitutions. However, this guarantee of freedom of speech does not confer freedom from responsibility for any abuse of that right, nor may it be used as a license to interfere with the rights of others. When such interference exists, the rights of others may be protected by duly enacted laws" (RT 2055:10-20).

The jury was then told that it was not permitted to consider the content of the ideas expressed by the demonstrators in determining whether their conduct was lawful or unlawful (RT 2055-2056) and that mere presence at the scene of the demonstration was insufficient to support a conviction (RT 2059). Rather, the jury was instructed upon the proper requisites of abettor liability under state law (RT 2058-2059).

The foregoing instructions in the *Brown* case, far from permitting the jury to convict upon constitutionally protected activity, ensured that any conviction would be confined within contitutional constraints as delineated in *Grayned*. We submit that the California Supreme Court, by lumping the *Brown* case together with the *Bozorg* matter, erred.

It is true that no comparable instructions were given in the *Bozorg* case. Rather, the jury was simply instructed in the language of the statute. The terms

wilfully and maliciously were correctly defined (Cal. Pen. Code §17) and "tumultuous" conduct was defined as "boisterous" or "noisy" (9 Cal.3d at 617). The sole instruction regarding the constitutional implications of the charged conduct was as follows:

> "A rally or demonstration is not necessarily in and of itself against the law. Whether or not it is a violation of the law must be determined by you from all of the evidence in the case and under the instructions of law as I have stated them to you." 9 Cal.3d at 622.

The omission of further instructions was subsequently explained by the trial judge in an affidavit submitted to the California Supreme Court and attached hereto as Appendix E. There, the judge explains that he himself resolved the constitutional issues and allowed the case to go to the jury only after determining that if the defendants were found to have engaged in the charged conduct such conduct was, as a matter of law, not protected by the First Amendment. Had he determined that defendants' alleged activity was constitutionally protected he would not have allowed the case to go to the jury (Appendix E).

We would urge that the trial court's legal determination in *Bozorg* might well have ensured that the defendants' First Amendment rights were protected in a fashion analogous to the protections ensured by the trial court's jury instruction in *Brown*. In any event, the distinction between the cases in this regard highlights the praiseworthy efforts of the trial

court in *Brown* to delineate for the jury the limits of the First Amendment issues there presented. For this reason, we urgently appeal to this Court to at very least grant certiorari in the *Brown* case to review the unduly restrictive interpretation placed upon the loud noise proviso of our breach of peace statute by the California Supreme Court. *Brown* was a proceeding where every effort was made to comport with the prior teachings of this Court which culminated in *Grayned* regarding the cherished and paramount rights of free speech and free assembly, while at the same time seeking to prevent unlawful noisy mob conduct which disrupts classes and in no way could legitimately claim the protections of the First Amendment.

II

THE CALIFORNIA SUPREME COURT ERRED BY REQUIRING JURY INSTRUCTIONS WHICH ESTABLISH ABSOLUTE FIRST AMENDMENT IMMUNITY FOR INTENTIONALLY DISRUPTIVE NOISY CONDUCT SOLELY BECAUSE COMMUNICATION OF IDEAS WAS ALSO INTENDED.

In its opinion, the California Supreme Court interpreted the "loud or unusual noise" provision of Penal Code section 415 to afford First Amendment protection to noisy conduct whenever "communication" is intended even when the noise (1) disturbs the peace and (2) is intended to disturb the peace. 9 Cal.3d at 619, 621, n.5.

A. The California Rule is Unprecedented:

This holding is totally at odds with any "traditional view" of the First Amendment, as a majority of the same Court only recently pointed out:

> "The high court has refused to accept the view that all conduct is to be deemed speech merely because it was intended to be communicative in some way." *Crownover v. Musick*, 9 Cal.3d 405, 419 (1973).
>
> "Not all acts intended to express ideas or convey information are protected forms of free speech." *In re Bushman*, 1 Cal.3d 767, 773 (1970).

And, in *Cox v. Louisiana*, 379 US. 536, 555 (1964), this Court "emphatically" rejected the notion that the First Amendment afforded the same protection to communication by conduct as to communication by "pure speech." Rather, it reaffirmed that:

> "It has never been deemed an abridgement of freedom of speech or press to make a course of *conduct* illegal merely because the conduct was in part *initiated*, evidenced or *carried out* by means of language, either *spoken*, written or printed." (Emphasis added.)

In short, it is settled law that "certain forms of conduct mixed with speech may be regulated." *Cox v. Louisiana*, 379 U.S. 559, 563 (1964); *accord, Adderley v. Florida*, 385 U.S. 39, 47-48 n.7 (1966).

The loud noise prohibition in California Penal Code section 415 regulates only the volume of sound, not the content of the communication. As such, it is a "manner" regulation of conduct, not a ban on speech.

Kovacs v. Cooper, 336 U.S. 77 (1958); *Grayned v. City of Rockford,* 408 U.S. 104 (1972).

But, we do not urge that free speech consists only of the right to be free from censorship of content. Protection of the means used is also required to assure effective communications. *Saia v. New York,* 334 U.S. 558, 560-562 (1948). However, as *Kovacs* and *Grayned* teach, the selection and use of means of communication is not unlimited, but rather is subject to reasonable regulation.

Section 415 is just such a reasonable regulation. If construed as we urge below, it prohibits loud noise only when, (1) there is a disturbance of the peace and (2) such a disturbance was intended.[11] In such circumstances, the fact that communication is also intended should not afford the conduct First Amendment protection. Compare, *Grayned v. City of Rockford, supra.*

But, says the California Supreme Court, section 415 "cannot be interpreted consistent with the First Amendment and traditional views as making criminal all loud shouting or cheering which disturbs and is intended to disturb." 9 Cal.3d 619. Rather, the court states that the statute "encompasses communications made in a loud manner only . . . when the communica-

[11]At Common Law a person could be guilty of disturbing the peace "even though no such eventuality was intended." *Cantwell v. Connecticut,* 310 U.S. 296, 309 (1940). However, section 415 by stating that the prescribed conduct be done "maliciously" as well as "wilfully", seems to require that the disturbance be intended. Pen. Code § 7.

tion is not intended as such but is merely a guise to disturb persons." *Id.*

B. The California Rule is Unworkable:

The California standard is novel. As already noted, it is not supported by decisional authority, nor by "traditional views." But, novelty and lack of precedent are but minor vices of the "communication as a guise for disruption" test. Nowhere in the opinion is the standard adequately explained. First, the California Supreme Court states "We conclude that section 415 cannot . . . be applied to all loud speech which disturbs others *even if it was intended to do so.*" Immediately thereafter, the Court states "Loud shouting and cheering *designed to disrupt rather than communicate,* may be prohibited generally." 9 Cal.3d at 621. Such contradictions render the statute unworkable in this highly sensitive area of mob-action lawbreaking.

Perhaps a specific example will illustrate the dilemma we perceive:

A hospital fires a minority employee. With picket sign and bullhorn in hand, the employee and his friends post themselves outside the hospital to *communicate* his grievance—he was fired because of his minority status not because of any lack of ability. In addition to communicating his grievance to the *outside* public, the employee *also intends* to make enough noise *to disturb* the hospital so as to draw the attention of the hospital staff and patients to his grievance. As a result, many sick patients who require peace and quiet are seriously *disturbed* and the cacophony also

disrupts the quietude of surgical and intensive care units, where physicians are hard at work.

In short, there is a disturbance of others, and the disturbance is intended. But, communication is also intended, not as a guise for disruption, but simply as an additional motivation.

Applying the California Supreme Court opinion literally to these facts, it seems that since communication is intended, the deliberate disruptive noise is to be afforded constitutional protection. It is only when disruption is the *sole* purpose of the noisy conduct that section 415 can be applied.

If such be the case, the loud noise portion of the statute would be emasculated. It would be totally unworkable and impossible to apply. One could deliberately engage in loud noise with impunity, simply by adopting a bona fide communication element as an alternative purpose.

Accordingly, we respectfully urge that certiorari be granted to review the standards announced in the opinion of the California Supreme Court in determining when loud noise which disturbs others, including, as here, college classes in session, is unlawful and when it is to be afforded First Amendment protection. We supply one alternative answer in the following section.

C. Properly construed, the loud noise portion of Penal Code section 415 is a time, place and manner regulation, sufficiently narrowly drawn to protect First Amendment activity.

The California Supreme Court opinion suggests that section 415 is not sufficiently narrowly drawn to pass muster as a reasonable time, place and manner regulation. 9 Cal.3d at 620. We respectfully disagree.

The "loud . . . noise" portion of the statute is precisely such a regulation. *Cohen v. California,* 403 U.S. 15, 19 (1971), is not to the contrary. There, the court was speaking only of the "offensive conduct" portion of section 415, when it held: "No fair reading of the phrase 'offensive conduct' can be said to sufficiently inform the ordinary person that distinction between certain locations are thereby created."

The California court now holds that the same is true of the loud noise portion of the statute. 9 Cal.3d at 620. We submit that no such infirmity affects the words "loud or unusual noise" which "disturbs the peace of any neighborhood or person." The opinion in *Cohen v. California, supra,* recognizes a distinction without articulating it and implicitly approved the loud noise portion of the statute. 403 U.S. at 21-22 n.4. We attempt such articulation here.

We believe that the ordinary person is sufficiently aware of the fact that loud noise may be tolerated at certain times and places and unacceptable and disturbing of the peace at other times and places. Reasonable men should know when loud noise is disruptive and when it is acceptable.

For example, no one would for a moment characterize loud noise at a football game or a political convention as disturbing the peace. *In re Kay,* 1 Cal.3d 930, 943, 83 Cal.Rptr. 686, 694 (1970); *People v. Kerrick,* 86 Cal.App. 542, 551-552 (1927). But the ordinary reasonable person knows and should know that the same loud noise outside a hospital, in a quiet residential area, or, as here, adjacent to classes in session, would substantially disturb, disrupt or impair the normal activity of such places.

We submit that section 415 may be properly construed to hold a person liable for engaging in loud noise which intentionally and substantially disrupts the normal activity of a particular place of which he knew or as a reasonable man should have known. *Grayned v. City of Rockford,* 408 U.S. 104, 116 119-120 (1972).[12] In this case, of course, the defendants had explicit notice. The temporary campus regulation on demonstrations spelled out precise guidelines for such activities. For, if the demonstrators had been on the athletic field as the regulation directed, they could have chanted or shouted as loud and as long as they wished.

In this regard, the California court's reliance on cases such as *Edwards v. South Carolina,* 372 U.S.

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[12]As the court in *Grayned* so cogently observed:

"We recognize that the ordinance prohibits some picketing that is neither violent or physically obstructive. *Noisy demonstrations that disrupt or are incompatible with normal school activities* are obviously within the ordinance's reach. Such expressive *conduct* may be constitutionally protected at other places or other times (citations), but *next to a school, while classes are in session it may be prohibited.*" 408 U.S. at 120 (our emphasis).

229, 235-238 (1963), is inappropriate. Loud noise found appropriate in a street as in *Edwards*, or even a park, cannot be equated to areas adjacent to classes, hospitals or libraries. The nature of a place, "the pattern of its normal activities, dictates the kind of regulations of time, place and manner that are reasonable." Wright, *The Constitution on the Campus*, 22 Vand.L.Rev. 1027, 1042 (1969): cited in *Grayned v. City of Rockford, supra.*

In summary, we submit that the loud noise provision of section 415 is a narrowly drawn, time, place and manner regulations: (1) only the volume or *manner* of expression is affected. (2) The prohibition does not apply to "all neighborhoods" but rather to places which reasonable men know or should know would be disrupted by loud noises; not all loud noises are unlawful. Only those which "disturb the peace" are prohibited. (3) Similarly, the prohibition does not apply "at all times" but only at such times as reasonable men know or should know that loud noise disturbs the peace.

Finally, the statute is further narrowed by requiring that the noisy disruption be done intentionally; loud noise which disturbs the peace is a violation only if done "wilfully and maliciously." Cal. Pen. Code §415. The quoted words are in turn defined by statute (Cal. Pen. Code §7) and are words considered by this Court to narrow the scope of a statute to comport with the First Amendment. *Adderley v. Florida*, 385 U.S. 39, 43 n.2 (1966).

CONCLUSION

For the foregoing reasons, we respectfully request that a writ of certiorari as prayed for herein be issued to review the decision of the California Supreme Court in the instant proceedings.

Dated, December 10, 1973.

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(Appendices Follow)

Appendix A

In the Supreme Court
of the State of California

IN BANK

In re Abbass Bozorg, et al., on Habeas Corpus.	Criminal No. 15,399
In re Robert F. Brown, et al., on Habeas Corpus. (Consolidated Cases)	Criminal No. 15,580

[Filed June 18, 1973]

OPINION

THE COURT:

Petitioners, Robert F. Brown and his six codefendants in one criminal prosecution, and Abbass Bozorg and his four codefendants in a second prosecution, were convicted after jury trials of violating Penal Code sections 408 (participating in an unlawful assembly and 415 (disturbing the peace). They were acquitted of charges of violating section 409 of that code (failure to disperse).

The appellate department of the superior court affirmed the judgments in the two cases and denied certifications to the Court of Appeal. Upon petitions for writs of habeas corpus, we issued orders to show cause.

On January 23, 1969, petitioners and approximately 1,000 other people attended a noon rally in the central area of the then named San Francisco State College campus to hear addresses by the chairman of the San Francisco Civil Service Commission and by several leaders of the student strike then in progress on campus. Because of the student strike, an administrative ban on all rallies in the central area of the campus had been instituted on January 6. This ban was still in effect on January 23.

During the morning of January 23 there had been picketing on campus. Towards noon the number of pickets increased as students gathered for the rally. Before the rally commenced two complaints of noise and of threats in the education building had been received; one class was dismissed early because of the din; and several professors and students testified that classes and study were disturbed while the participants gathered.

During the rally itself there was chanting and shouting of slogans which one witness described as "thunderous." Picket signs and banners were waved and clenched fists were raised to punctuate the speeches and chants. However, despite these activities and the large number of people in attendance, the mass meeting was generally orderly. All petitioners were present at the rally for the purpose of hearing the speakers and demonstrating their support for the strike.

In anticipation of the disruptions, many police officers had been posted on campus. At 12:10, 194 police officers were brought to the central area, flanking the

crowd at the speaker's platform. Approximately five minutes after the arrival of the police. Mr. Scoble, a representative of the college administration, was called to the speaker's platform by police officials. He announced that the assembly was unlawful; he ordered that the participants vacate the central campus area; and he further suggested that these gathered move on to the athletic field.[1] Five minutes after Mr. Scoble's announcement, Lieutenant Emil of the San Francisco Police Department also declared from the speaker's platform that the assembly was unlawful and ordered the crowd to disperse. There was evidence presented that a large number of people did not hear either this or Mr. Scoble's announcement. Some of those who heard the announcements responded by shouting obscenities and by shaking clenched fists while others left the rally immediately after Lieutenant Emil's announcement.

Approximately three minutes after Lieutenant Emil's announcement, the police who had been flanking the speaker's platform encircled the crowd that remained. An arrest order was given within five minutes of the officer's announcement. Everyone within the police circle, including petitioners and 425 others,

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[1]The text of Mr. Scoble's announcement was as follows: "I am a representative of Dr. Hayakawa, President of San Francisco State College.

"Penal Code section 407 provides that whenever two or more persons assemble together to do an unlawful act or to do a lawful act in a violent, boisterous or tumultuous manner such conduct constitutes an unlawful assembly.

"The present conduct of those persons who are now assembled in the central campus area constitutes an unlawful assembly and I direct you to leave the central campus area.

"You may move on to the Women's Athletic Field or off the campus."

were placed under arrest. The police confiscated assorted objects from various individuals who were arrested. One of the 12 petitioners had in his possession a large picket standard supported on a 2-by 4-inch stick; four had smaller picket standards in their possession; and one of these four also carried knitting needles with knitting attached; none of the others carried any objects which were confiscated.

The Convictions of Violations of Penal Code Section 415.

Section 415 of the Penal Code provides in pertinent part: "Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct . . . is guilty of a misdemeanor. . . ."

In the *Bozorg* case, the jury was read the pertinent parts of Penal Code section 415. No general explanation of the statute was given and only three words were specifically defined for the jurors. They were told that "tumultuous" means "boisterous conduct, disorderly, noisy," that "willfully" means "simply a purpose or willingness to commit the act or to make the omission in question" and that "maliciously" means with an intent to vex or annoy or injure another person or with an intent to do a wrongful act.

In the *Brown* case, the jury was similarly read the applicable provisions of Penal Code section 415. Definitions of the words "willfully" and "maliciously" were given that were substantially equivalent to those

given in the *Bozorg* case. The word "tumultuous" was defined as meaning "boisterous; conducted with disorder; disorderly; noisy; confused." As in *Bozorg,* no further definitions were given. Thus, no definition of the word "offensive" or the phrase "loud or unusual noise" was provided for the jury.[2]

In concluding the instructions on section 415 in the *Brown* case, the judge, unlike the judge in the *Bozorg* case, instructed the jurors on freedom of speech. They were told that "the right . . . to peaceably assemble includes the right to communicate ideas by singing, chanting and shouting, as well as by signs, symbols and slogans," but that "pickets shouting in unison in a loud and boisterous manner disturbing the peace and quiet of the neighborhood and thereby interfering with a complainant's peaceful enjoyment of property is unlawful conduct."

The jury was also instructed that "The offense known as breach of the peace embraces a large variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. When clear and present danger of immediate threat to public safety, peace, or order appears, the power of the State to prevent or punish is obvious.

The literal language of section 415 embraces a wide variety of prohibited conduct. Much of such conduct was never intended to be proscribed, and some of the

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[2]In fact, the phrase was continually misstated by the court. The judge twice used the phrase "loud and offensive noises" in her instructions rather than the statutory language "loud and unusual noise."

other prohibitions are limited by First Amendment considerations. We held in the case of *In re Bushman* (1970) 1 Cal.3d 767, 773 [83 Cal.Rptr. 375, 463 P.2d 727], that that portion of section 415 prohibiting disturbing the peace by tumultuous and offensive conduct was limited to "disruption of public order by acts that are themselves violent or that tend to incite others to violence." In so limiting the statute, we relied upon the traditional and historical meaning of similar statutes and in addition reasoned that such limitation was essential so that the section would not infringe the guarantee of freedom of speech set forth in the First Amendment.

In *Cohen v. California* (1971) 403 U.S. 15, 17 [29 L.Ed.2d 284, 289, 91 S.Ct. 1780], the United States Supreme Court further limited the applicability of Penal Code section 415. The court reasoned that the portion of the statute dealing with "offensive" conduct could not validly be applied to speech or conduct which merely had a tendency to provoke others to violence and that the proscription was valid only where there was a clear and present danger that violence will imminently erupt.

It is clear that the instructions in the instant cases failed to comply with the requirements of *Bushman* and *Cohen*. The jury was not told in either case that "tumultuous" means acts violent in themselves or that "offensive" applies only where there is a clear and present danger that others will be provoked to immediate violence. Although the judge in *Brown* did instruct on the right to peacably assemble and made

reference to violence, these instructions did not limit the proscription of section 415 to violent conduct or the provocation of violent conduct. The instruction on the right to assemble was qualified by language which indicated that shouting which disturbed others in their enjoyment of their property was unlawful. The reference to violence in the instructions was not by way of limitation but merely by way of illustration, pointing out that violence was included in conduct which might menace tranquility.

Not only were the instructions too broad but it furthers appears that the evidence did not warrant any instructions on the portion of section 415 prohibiting "tumultuous" and "offensive conduct." There is no evidence that any of the petitioners used or threatened to use any of the objects confiscated in a violent manner or that they engaged in any "acts that are [by] themselves violent." (*In re Bushman, supra,* 1 Cal.3d 767, 773.) Evidence of violent acts by others on prior occasions may not justify a conviction of petitioners for tumultuous conduct. Evidence was totally absent that any of the petitioners' conduct constituted a clear and present danger of provoking others to imminent violence. (*Cohen v. California, supra,* 403 U.S. 15, 17.) There was no showing of a hostile audience which might have been enraged by the conduct of petitioners at the rally.

The Attorney General seeks to preserve the convictions of violating section 415 on the basis of the language in that section prohibiting "maliciously and wilfully disturbing the peace or quiet . . . by loud

or unusual noise." He states that there is substantial evidence that petitioners made loud noises which disrupted class and campus functions.[3]

The statute, however, cannot be interpreted consistent with the First Amendment and traditional views as making criminal all loud [sic] or cheering which disturbs and is intended to disturb persons.[4] When the word "noise" in the statute is properly construed consistent with the First Amendment and traditional views, it encompasses communications made in a loud manner only when there is a clear and present danger of violence or when the communication is not intended as such but is merely a guise to disturb persons.

Edwards v. South Carolina (1963) 372 U.S. 229, 235-238 [9 L.Ed.2d 697, 701-704, 83 S.Ct. 680], and *Cox v. Louisiana* (1965) 379 U.S. 536, 546-550 [13 L.Ed.2d 471, 479-481, 85 S.Ct. 453], held that participating in mass demonstrations in the city streets involving picketing and noisy singing and chanting that undoubtedly disturbed some peaceful enjoyment of

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[3]The noise in the instant case was due to speaking, chanting and shouting, and we are not concerned here with the alternative prohibition of "unusual" noise.

[4]Subdivisions 1 and 4 of section 7 of the Penal Code define the words "willfully" and "maliciously": "1. The word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law or to injure another, or to acquire any advantage;

". . . . . .

"4. The words 'malice' and 'maliciously' import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law; . . ."

If section 415 is viewed as a prohibition of disturbing others, the requirement imported by the terms "willfully" and "maliciously" is simply that the actor intends to disturb.

property was protected under the First Amendment. Such loud and boisterous conduct was criminal therefore only when it involved a clear and present danger of violence.

As we recognized in *In re Kay* (1970) 1 Cal.3d 930, 940 [83 Cal.Rptr. 686, 464 P.2d 142]: " 'Political campaigns, athletic events, public meetings and a host of other activities produce loud, confused or senseless shouting not in accord with fact, truth, or right procedure to say nothing of not in accord with propriety, modesty, good taste or good manners. The happy cacophony of democracy would be stilled if all "improper noises" in the normal meaning of the term were suppressed.' "

As early as 1927, the California courts recognized that loud shouting is not in itself unlawful. The court in *People v. Kerrick* (1927) 86 Cal.App. 542, 551-552 [261 P. 756], stated: "Not every meeting where violent, boisterous, and tumultuous conduct occurs may be denominated an unlawful assembly, even though that be the wording of the statute. It is particularly dangerous in a country where meetings are constantly held for every conceivable purpose, many of them accompanied with much noise and excitement, to lay down such a doctrine. At this time of the year in our country in almost every hamlet, and certainly in every city of any size, contests between the youth of schools and colleges are being staged which could not be characterized as anything other than violent, boisterous, and tumultuous. Yet the communities are not alarmed and the public peace is not endangered. No one would

for a moment characterize high school or college football games as unlawful assemblies."

The courts have long recognized that there may be limitations on the exercise of the right to free speech based on time, place, or manner of the exercise of the right. (See, e.g., *Healy v. James* (1972) 408 U.S. 169, 192-193 [33 L.Ed.2d 266, 286, 92 S.Ct. 2338]; *Kovacs v. Cooper* (1949) 336 U.S. 77 [93 L.Ed. 513, 69 S.Ct. 448, 10 A.L.R.2d 608]; *Wollam v. City of Palm Springs* (1963) 59 Cal.2d 276, 283 [29 Cal.Rptr. 1, 379 P.2d 481].) Precisely worded statutes establishing reasonable regulations based on the time, place or manner of the exercise of the right of speech will be upheld. Section 415 in this respect may be contrasted to the narrowly drawn statute in *Cox v. Louisiana,* 379 U.S. 559 [13 L.Ed.2d 487, 85 S.Ct. 476], relating to picketing at courthouses. Although the Legislature by carefully drafted statutes could properly establish substantial limitations on noise in particular places such as areas near hospitals and campuses (*Healy v. James, supra,* 408 U.S. 169, 192-193, *Grayned v. City of Rockford* (1972) 408 U.S. 104, 118 [33 L.Ed.2d 222, 233, 92 S.Ct. 2294]; *Tinker v. Des Moines School Dist.* (1969) 393 U.S. 503 [21 L.Ed.2d 731, 89 S.Ct. 733]), section 415 contains no such limitation but applies to all neighborhoods and in addition, to all persons who are disturbed. Moreover, the question is foreclosed by *Cohen v. California, supra,* 403 U.S. 15, 19 [29 L.Ed. 2d 284, 290], where the court speaking of the provision in section 415 relating to offensive conduct said that the provision would not inform the ordinary person that distinctions between localities were created.

The prohibition on loud noise does not purport to be a reasonable time limitation, as it applies at all times. The manner limitation, "loud," is so broad as to amount to a total prohibition on loud public speech. Although reasonable regulations on the volume of speech are permissible, a prohibition of all loud speech is not. (*Saia v. New York* (1948) 334 U.S. 558, 560-562 [92 L.Ed. 1574, 1577-1578, 68 S.Ct. 1148]; *Wollam v. City of Palm Springs, supra,* 59 Cal.2d 276, 284 et seq.; see *Kovacs v. Cooper, supra,* 336 U.S. 77, 82, [93 L.Ed. 513, 519-520].) We conclude that section 415 cannot, consistent with First Amendment rights, be applied to prohibit all loud speech which disturbs others even if it was intended to do so.

We do not hold, however, that section 415 may never be applied to loud shouting and cheering. There is a fundamental difference between loud communications and the use of loud shouting and cheering, not to inform or persuade, but to disrupt lawful endeavors. Loud shouting and cheering designed to disrupt rather than communicate may be prohibited generally. As stated in *Giboney v. Empire Storage Co.* (1949) 336 U.S. 490, 502 [93 L.Ed. 834, 843-844, 69 S.Ct. 684], "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either *spoken,* written, or printed." (Italics added; see also, *Cox v. Louisiana, supra,* 379 U.S. 559, 563 [13 L.Ed.2d 487, 491-492]; *Cox v. Louisiana, supra,* 379 U.S. 536, 555 [13 L.Ed.2d 471, 484].) The use of the human

voice to disturb others by the mere volume of the sound when there is no substantial effort to communicate or when the seeming communication is used as a guise to accomplish the disruption may be prohibited consistent with First Amendment guarantees.

We are satisfied that loud shouting and cheering constitutes the loud "noise" prohibited by section 415 only in two situations, 1) where there is a clear and present danger of imminent violence and 2) where the purported communication is used as a guise to disrupt lawful endeavors. Measured by this standard, it is clear that the instructions in both cases before us relating to Penal Code section 415 were inadequate and erroneous.[5]

The Convictions of Violations of Penal Code Section 408.

We turn next to the convictions for unlawful assembly in violation of Penal Code section 408. At the times relevant here, Penal Code section 407 provided: "Whenever two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous or tumultuous manner, such assembly is an

[5]The problem was particularly accentuated in the *Brown* case because the judge in discussing the right to communicate by shouting went on to qualify the right by stating that it was unlawful to shout in unison in a loud and boisterous manner where the quiet of the neighborhood was disturbed and there was interference with the peaceful enjoyment of property. By this qualification, communications would be unlawful as long as there was shouting which disturbed others whether the shouting was for purposes of communication and regardless whether there was a clear and present danger of imminent violence.

unlawful assembly."[6] Section 408 provides that any person who participates in an unlawful assembly is guilty of a misdemeanor.

In both the *Brown* and *Bozorg* cases the juries were instructed in the language of the statute except that in the *Bozorg* case, the word "violent" was omitted from the instruction. In neither case were any of the words of the statute defined. "Tumultuous" had been defined by both courts previously as meaning boisterous, disorderly, noisy or confused. Both courts instructed that the administrative ban on rallies was purely a statement of administrative policy and not a statement of the law of the State of California.

In *Bozorg* there was only one instruction given on freedom of speech. The jury was told that "A rally or a demonstration is not necessarily in and of itself against the law. Whether or not it is a violation of law must be determined by you from all of the evidence in the case and under the instructions of law as I have stated them to you."

In *Brown* there were extensive instructions given on freedom of speech. The jury was told that "An assembly of persons attended by circumstances reasonably calculated to excite alarm may be an unlawful assembly" but the fact that a policeman declared the assembly unlawful did not make it so.

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[6]In 1969, the Legislature deleted the phrase "and separate without doing or advancing toward it." (Stats. 1969, ch. 365, p. 890, § 1.)

The jury was further told that "A peaceful assembly is an exercise of freedom of speech guaranteed to all by the First Amendment to the United States Constitution. It is not a violation of the law to attend and remain at a peaceful assembly." The jury was also told that the "right of freedom of speech is protected by both the federal and state constitutions. However, this guarantee of freedom of speech does not confer freedom from responsibility for any abuse of that right, nor may it be used as a license to interfere with the rights of others. When such interference exists, the rights of others may be protected by duly enacted laws."

The court in *Brown* concluded its instructions by stating that in determining whether the assembly was unlawful the jury was not permitted to pass on the content of the ideas expressed by the participants. The jury was permitted to consider the ideas only as evidence of the participants' state of mind.

The right to assemble peaceably, like freedom of speech, is guaranteed by the First Amendment. As noted earlier we held in *In re Bushman, supra,* 1 Cal. 3d 767, 773, that in light of the First Amendment guarantee of freedom of speech, the provision in section 415 prohibiting disturbing the peace by tumultuous and offensive conduct must be limited to disruption of public order by acts that are themselves violent or that tend to incite others to violence. The First Amendment guarantee of the right to assemble peaceably, requires similar limiations on the provision in section 407 prohibiting assembly to do "a lawful

act in a violent, boisterous or tumultuous manner." (See *Brandenburg v. Ohio* (1969) 395 U.S. 444, 449, fn. 4 [23 L.Ed.2d 430, 435, 89 S.Ct. 1827]; *Cox v. Louisiana, supra,* 379 U.S. 536, 544-552 [13 L.Ed.2d 471, 478-483].)

The foregoing is the traditional construction of the lawful act provision of section 407. It has long been recognized that the portion of section 407 which proscribes assembling to do a lawful act in a violent, boisterous or tumultuous manner must be narrowly construed. (*People v. Kerrick, supra,* 86 Cal.App. 542, 551-552.) Although the public may fear a large, noisy assembly, particularly an assembly that espouses an unpopular idea, such an apprehension does not warrant restraints on the right to assemble unless the apprehension is justifiable and reasonable and the assembly poses a threat of violence. (*Id.,* see also *In re Bacon* (1966) 240 Cal.App.2d 34, 50 [49 Cal.Rptr. 322].) Accordingly, the proscriptions of sections 407 and 408 on assemblies to do a lawful act must be limited to assemblies which are violent or which pose a clear and present danger of imminent violence.

Not only were the instructions on the lawful act portion of section 407 erroneous in that they did not limit the offense to assemblies which are violent or which pose a clear and present danger of imminent violence, but the evidence was insufficient for conviction under this portion of the statute. As pointed out earlier there is no evidence that petitioners engaged in acts which were by themselves violent or which posed clear and present danger of violence.

The alternative proscription of sections 407 and 408, assembly to do an unlawful act, was at the time relevant here qualified by the requirement that the persons "separate without doing or advancing toward it." In the case of *In re Bacon, supra,* 240 Cal.App. 2d 34, 48-50, the court concluded that this court, in *Coverstone v. Davies* (1952) 38 Cal.2d 315, [239 P.2d 876], had in effect eliminated that requirement in former section 407. The majority in *Coverstone,* which was an action for false arrest, did not expressly deal with the requirement of separation without doing or advancing toward the illegal act, but merely concluded that there was probable cause to arrest for violation of section 407 on the basis that the defendants had assembled to view a "hot rod" race. The dissenting view likewise did not treat the separation requirement. Although under the facts as stated in *Coverstone* it appears that there was no separation, the case should not be read as deleting the statutory requirement.

In California all crimes are statutory and there are no common law crimes. Only the Legislature and not the courts may make conduct criminal. (Pen. Code §6; *People v. Mosher* (1969) 1 Cal.3d 379, 385, fn. 1 [82 Cal.Rptr. 379, 461 P.2d 659].) (10) Deletion by the courts of one of the statutory requirements of a crime would make conduct criminal which the Legislature has not seen fit to make criminal and would violate the fundamental principle that there are no common law crimes in this state. Insofar as *Bacon* indicates that this court deleted one of the statutory require-

ments of an unlawful assembly or that a court could do so, it is disapproved.

There is no substantial evidence sufficient to justify a finding by the jury that the petitioners or any of them assembled with the purpose of doing an unlawful act and separated without doing it or advancing toward it. An unlawful act within the meaning of section 407, as the Attorney General concedes, means criminal conduct prohibited by state law. The evidence is such that a jury would be required to find either that the petitioners did not assemble to do an unlawful act or that they did so assemble and that they accomplished the unlawful act or advanced toward it. This is because the only evidence that they assembled to do an unlawful act is their presence at and conduct during the demonstration; such presence or conduct cannot logically furnish an inference that they assembled to do an unlawful act and at the same time an inference that they did not advance toward it or accomplish it.

Habeas Corpus.

"Habeas corpus is available in cases where the court has acted in excess of its jurisdiction. (Pen. Code, §1487, subd. 1; *Neal v. State of California* [1960] 55 Cal.2d 11, 16 [9 Cal.Rptr. 607, 357 P.2d 839].) For purposes of this writ as well as prohibition or certiorari the term 'jurisdiction' is not limited to its fundamental meaning, and in such proceedings judicial acts may be restrained or annulled if determined to be in excess of the court's powers as defined by consti-

tutional provision, statute, or rules developed by courts. [Citations.] In accordance with these principles a defendant is entitled to habeas corpus if there is no material dispute as to the facts relating to his conviction and if it appears that the statute under which he was convicted did not prohibit his conduct. [Citations.]" (*In re Zerbe* (1964) 60 Cal.2d 666, 667-668 [36 Cal.Rptr. 286, 388 P.2d 182, 10 A.L.R.3d 840]; see also *People v. Mutch* (1971) 4 Cal.3d 389, 396 [93 Cal.Rptr. 721, 482 P.2d 633]; *In re Wallace* (1970) 3 Cal.3d 289, 293 [90 Cal.Rptr. 176, 475 P.2d 208].) Habeas corpus thus is an appropriate remedy to challenge the convictions for unlawful assembly in violation of Penal Code sections 407 and 408 because there is no substantial evidence to support the convictions.

With respect to the convictions of violation of section 415 of the Penal Code, we have noted that there is no substantial evidence to sustain the convictions on the basis of the portion of the section prohibiting tumultuous or offensive conduct. No instructions should have been given on this portion of the section. Nevertheless the courts gave such instructions which erroneously defined the crime. Under the erroneous instructions the evidence strongly pointed to guilt, and there is no way to ascertain whether petitioners' convictions were in fact based on such instructions.

The evidence relating to the loud noise portion of section 415 strongly indicates that although the demonstrators' purpose was to interrupt academic functions on the campus they sought to do so by persuasive

communications rather than by disruption in the guise of communication. There is no evidence that petitioners themselves engaged in violence or that their conduct presented a clear and present danger of violence. The instructions in the instant cases left the juries free to convict even though they believed that the cheering and shouting was for the purpose of communicating views and of enlisting support for those views.

Under these circumstances petitioners have met their burden of establishing that their convictions of violation of section 415 were based on constitutionally protected conduct. (*In re Bushman, supra,* 1 Cal.3d 767, 774; *In re Klor* (1966) 64 Cal.2d 816, 821 [51 Cal. Rptr. 903, 415 P.2d 791].)

The writs of habeas corpus are granted, and petitioners are discharged from the custody imposed by the Municipal Court for the City and County of San Francisco pursuant to the judgments of July 1, 1969 and January 5, 1970.

McComb, J.—I dissent. I would deny the writs.

[June 1973]

Appendix B

In the Supreme Court
of the
State of California
IN BANK

In re Abbass Bozorg, et al. on Habeas Corpus.	Crim. No. 15580, 15399

[Filed July 18, 1973]

ORDER DENYING REHEARING

Respondents' petition for rehearing DENIED.

McComb, J., and Clark, J., are of the opinion that the petition should be granted.

/s/ Wright
Chief Justice

I, G. E. Bishel, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 30th day of July, A.D. 1973.

/s/ By G. E. Schneider
Deputy Clerk

Appendix C

INSTRUCTIONS

The complaint in this case charges each of the defendants before you with three counts. The first count charges that the said defendants did, in the City and County of San Francisco, State of California, on or about the 23rd day of January, 1969, commit the crime of misdemeanor, to-wit: Violating Section 415 of the Penal Code in that said defendants did then and there maliciously and wilfully disturb the peace and quiet of the campus of San Francisco State College by making loud and unusual noise and by tumultuous and offensive conduct.

Count 2 provides that the said defendants did, in the City and County of San Francisco, State of California, on or about the 23rd day of January, 1969, commit the crime of misdemeanor, to-wit: Violating Section 408 of the California Penal Code, in that said defendants did participate in an unlawful assembly.

Count 3 provides that the said defendants did, in the City and County of San Francisco, State of California, on or about the 23rd day of January, 1969, commit the crime of misdemeanor, to-wit: Violating Section 409 of the California Penal Code, in that said defendants did remain present at the place of an unlawful assembly after the same had been lawfully warned to disperse.

Those are the complaints, ladies and gentlemen.

On their first appearances in court, their arraignments to these charges, all of the defendants pleaded

not guilty, thus putting in issue every material allegation contained in the complaints which have just been read to you.

I am now going to give you some instructions on intent, the intent required for a finding of guilty in these cases.

The first instruction on intent concerns general criminal intent. It relates to Counts 2 and 3.

In crimes such as those of which each defendant is charged in Counts 2 and 3, specifically the unlawful assembly and the failure to disperse, there must exist a union or joint operation of act or conduct and criminal intent. These are crimes in which there is involved a general criminal intent. In this type of crime, to constitute criminal intent it is not necessary that there should exist an intent to violate the law. Where a person intentionally does that which the law declares to be a crime, he is acting with criminal intent, even though he may not know that his act or conduct is unlawful.

With regard to Count 1, disturbing of the peace, in regard to Count 1, Section 415 of the Penal Code, disturbing the peace, it is necessary that in addition to the intended act which characterizes the offense, the act must be accompanied by a specific or particular intent without which such crime may not be committed. Thus, in this crime, disturbing the peace, a necessary element is the existence in the mind or minds of the perpetrator or perpetrators of the specific intent to vex, annoy or injure another person,

or the intent to do a wrongful act by making loud and offense noise and by tumultuous and offensive conduct, and unless such intent so exists, that crime is not committed.

The intent with which an act is done is manifested by the circumstances attending the act, the manner in which it is done, the means used, and the sound mind and discretion of the person committing the act. All persons are of sound mind who are not affected by insanity.

For the purpose of the issues now on trial, you must assume that the defendants were sane at the time of the alleged conduct which, it is charged, constituted a crime described in the Information.

If that were not the case there would have been preliminary proceedings.

Now I am going to now advise you of the intent in relation to the disturbing of the peace.

The specific intent with which an act is done is manifested by the circumstances surrounding its commission. But you may not find the defendants guilty of the offense charged in Count 1, disturbing the peace, unless the proved circumstances not only are consistent with the hypothesis that the defendants had the specific intent to vex, annoy or injure another person, or the intent to do a wrongful act by making loud and offensive noise and by tumultuous and offensive conduct. You also must find that the circumstances are irreconcilable with any other rational conclusion.

Now, evidence was offered in this case for the purpose of showing that the Defendants Robert F. Brown and Sheila M. Brown were arrested on a previous occasion in New York City for violation of a statute prohibiting disorderly conduct, which statute is comparable to California's Section 415, prohibiting disturbing of the peace, and for a violation of a statute prohibiting refusal to obey a police officer's order to leave the scene of disorderly conduct.

Such evidence was received for a limited purpose only: Not to prove distinct offense or continual criminality, but for such bearing, if any, as it might have on the question whether the defendants are innocent—and I mean in this case the Defendants Mr. and Mrs. Brown—are innocent or guilty of the charges against them in this action.

You are not permitted to consider that evidence for any other purpose, and as to that purpose you must weigh such evidence as you do all other evidence in the case.

The value, if any, of this particular evidence depends on whether or not it tends to show that these two defendants entertained the intent which is a necessary element of the alleged crimes for which they now are on trial.

This particular evidence that was admitted about Mr. and Mrs. Brown must not be considered in relation to the other five defendants in any way, ladies and gentlemen.

I am now going to give you instructions on disturbing the peace, one of the specific charges, the first count.

You are instructed that Section 415 of the Penal Code, the disturbing the peace section, as applicable to this case, provides as follows:

Every person who maliciously and wilfully disturbs the peace or quiet of any neighborhood or persons, by loud or unusual noise, or by tumultuous or offensive conduct, is guilty of a misdemeanor.

I instruct you that a campus is a neighborhood within the meaning of this section.

The word "tumultuous" as used in that section is defined as meaning boisterous; conducted with disorder; disorderly; noisy; confused.

The word "wilfully," which is used in that section, when applied to the intent with which an act is done or omitted, and as just used in that section, implies simply a purpose or willingness to communicate the act or to make the omission in question. It does not require any intent to violate the law, or to injure another, or to acquire any advantage.

The words "malice" and "maliciously," which appear in the definition of disturbing the peace, import a wish to vex, annoy or injure another person, or an intent to do a wrongful act.

The meaning of the words "wrongful act," which I have just read to you in the definition of malice, are not restricted to an intent to commit a crime,

though it may cover such a situation. The words "wrongful act" also cover any activity which, in the ordinary course of events, will infringe upon or violate the rights of another to his disadvantage.

When a defendant is charged with the offense of disturbing the peace, as these defendants are, in which any of the acts charged constitute the offense, the defendant may be found guilty if the proof shows beyond a reasonable doubt that the defendants committed any one or more of such acts, but in order to return a verdict it is necessary that all of the jurors agree as to the same act or acts by each defendant. It is not necessary that these particular act or acts so agreed upon be stated in your verdict, however.

The right of the People, ladies and gentlemen, to peaceable assemble, includes the right to communicate ideas by singing, chanting and shouting, as well as by signs, symbols and slogans.

You are instructing that pickets shouting in unison in a loud and boisterous manner, disturbing the peace and quiet of a neighborhood and thereby interfering with peaceful enjoyment of property, is unlawful conduct.

The offense known as breach of the peace, or disturbance of the peace, embraces a large variety of conduct destroying or menacing public order and tranquality. It includes not only violent acts, but acts and words likely to produce violence in others. When clear and present danger of immediate threat to public safety, peace or order appears, the power of the state to prevent or punish is obvious.

Now I am going to read you some instructions on Section 408 of the Penal Code, which is the second count.

Section 408 of the Penal Code, with which the defendants are charged in Count 2, provides as follows:

Every person who participates in any unlawful assembly is guilty of a misdemeanor.

Section 407 of the Penal Code provides as follows:

Whenever two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous or tumultuous manner, such assembly is an unlawful assembly.

An assembly of persons attended by circumstances reasonably calculated to excite alarm may be an unlawful assembly.

The mere fact that a police officer declared the assembly to be unlawful does not necessarily make it an unlawful assembly.

You are instructed that neither the acting president of a college or any other school official can declare any assembly to be unlawful, nor does an order so given amount to a warning to disperse, which may be given only by a sheriff or police officer.

A peaceful assembly is an exercise of freedom of speech guaranteed to all by the First Amendment to the United States Constitution. It is not a violation of the law to attend and remain at a peaceful assembly.

The right of freedom of speech is protected by both the Federal and State Constitutions. However, this guarantee of freedom of speech does not confer freedom from responsibility for any abuse of that right, nor may it be used as a license to interfere with the rights of others. When such interference exists, the rights of others may be protected by duly enacted laws.

In determining whether the assembly in this case was unlawful or lawful, you must not consider whether the ideas expressed by the assembly, or by any of the participants therein, were proper or improper, wise or unwise, reasonable or unreasonable, valuable or worthless, sound or unsound, or even whether they were dangerous.

Thus, you are not to judge the ideas expressed by the assembly, nor shall your verdict reflect approval or disapproval of such ideas. However, you may consider the content of such ideas as to the issues of state of mind.

Appendix D

CALJIC 16.261 (1973 Revision)
Criminal Instructions

Breach of Peace—Definition of Terms Used

As used in these instructions the following terms have the following meanings:

1. The term "loud or unusual" noise does not mean all loud shouting or cheering such as at an athletic event or political rally. Nor does it include all loud speech which disturbs others even if intended to do so. What the term does mean is loud shouting and cheering where there is a clear and present danger of its giving rise to immediate violence or where such loud shouting and cheering is not intended as a means of communication to inform or persuade but is used as a guise to disrupt lawful endeavors.

2. The term "tumultuous" conduct means acts violent in themselves.

3. The term "offensive" conduct does not mean speech or conduct which merely has a tendency to provoke others to violence. What the term does mean is speech or conduct which constitutes a clear and present danger of provoking others to immediate violence.

Use Note

This instruction is limited to loud shouting and cheering as "loud or unusual" noise as set forth in In re Bozorg, infra.

CALJIC 16.460

Misdemeanor Instructions

COMMENT

Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284; In re Bozorg, 9 Cal.3d 612, 108 Cal. Rptr. 465, 510 P.2d 1017; In re Bushman, 1 Cal.3d 767, 83 Cal.Rptr. 375, 463 P.2d 727.

Appendix E

In the Supreme Court
of the
State of California

In re Abbass Bozorg, et al. on Habeas Corpus.	No. 15399

AFFIDAVIT OF HONORABLE FRANCIS McCARTY JUDGE OF THE SUPERIOR COURT CITY AND COUNTY OF SAN FRANCISCO

State of California—ss.
City/County of San Francisco

Honorable Francis McCarty, being first duly sworn, deposes and says:

I am Presiding Judge of the Superior Court of the State of California for the City and County of San Francisco.

During May and June of 1969 I acted as a *pro-tem* trial judge in the San Francisco Municipal Court to assist in the disposition of cases arising out of the turmoil at San Francisco State College in 1968 and 1969. The cases in question had imposed an insurmountable strain upon the Municipal Court which was alleviated only by the voluntary service of several Superior Court judges as *pro-tem* Municipal Court judges.

From May 8, 1969, through June 10, 1969, I acted as trial judge in the case of *People v. Bozorg, et al.*, No. 1526-1/2 in the files of the Appellate Division of the San Francisco Superior Court.

At trial, defendants' counsel submitted a group of jury instructions setting forth various legal conclusions regarding the right of free speech and freedom of assembly and the application of these rights to the case being tried. I rejected these instructions.

I understand that the transcript of the trial does not reflect any discussion, argument or ruling concerning instructions. Such discussion was in fact held off the record without a court reporter. I cannot, of course, recall or relate the arguments of counsel. I can, however, outline generally my reasoning in rejecting the proferred instructions.

First, the question of whether or not the defendants alleged conduct, as distinguished from pure speech, was protected by the First Amendment was deemed to be an issue of law for the court. Thus, if the conduct that the defendants allegedly engaged in was, as a matter of law, protected by the First Amendment, the case could not go to the jury and I would have dismissed the complaint. However, I concluded that defendants' conduct, if truly engaged in, was as a matter of law not protected by the First Amendment. Consequently, the case was submitted to the jury with appropriate instructions which are of record, to determine whether in fact the defendants had engaged in conduct prohibited by the statutes.

It may be observed in this regard that although defendants were convicted of disturbing the peace and unlawful assembly, they were acquitted of the charge of refusal to disperse. This suggested to me that the jury understood the instructions given and was able to properly apply them to the evidence presented.

Alternatively, I pointed out to defense counsel that if I gave the First Amendment instructions he requested, I would also be required to give instructions advising the jury that if the defendants were found to have engaged in the conduct charged, thereby violating the statutes in question, such conduct was not protected by the First Amendment. I felt certain that the jury would be confused and misled, had I followed this approach. I also concluded that such instructions could be a detriment rather than a benefit to the defendants. In any event, it is my firm belief that the issue of application of the First Amendment was not properly one for the jury in this case.

/s/ Francis McCarty
Francis McCarty, Judge

Subscribed and sworn to before me this 2nd day of June, 1971.

(Seal)

/s/ John W. Egan
Notary Public for said
County and State

My Commission Expires
Dec. 7, 1972.